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No. 96-1201

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, et al.,

Petitioners,

versus

DAVID M. BEASLEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

I. The Issue of Catalyst Is Properly Before the Court

The Senate respondent's argument that the petition should be denied because petitioners disclaimed reliance on catalyst or causation theory in the court of appeals is without merit. Petitioners expressly relied on catalyst theory in the district court. As that court found, "[t]he Republican Party specifically claims that its lawsuit acted as a catalyst in bringing about redistricting." App. 18. Relying upon *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994), the district court rejected catalyst theory as a basis for a fee award. App. 18-9.

On appeal, petitioners also argued that the court should apply "catalyst theory" in evaluating the degree of success obtained by the litigation. Reply Brief for Plaintiffs-Appellants, p. 10 (arguing that "[t]he courts have . . . applied catalyst theory at 'the secondary stage of evaluating the degree of success obtained' by a prevailing party").[1] The catalyst issue was, moreover, fully litigated and decided by the court of appeals. The Senate respondent, for example, argued that the district court correctly applied *S-1 and S-2* "in finding that Plaintiffs were not prevailing parties because they had not obtained an enforceable judgment." Brief for Intervenor-Appellee the South Carolina Senate, p. 4. Respondent Wilkins argued

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[1] It is hardly surprising that petitioners did not rest their claim for fees in the court of appeals entirely on the catalyst theory. No litigant can be expected to stress a legal theory to a court which has previously rejected that theory as a matter of law.

that plaintiffs had not established a "causal connection[ ]" within the meaning of *S-1 and S-2* between the litigation and the adoption of legislative redistricting plans. Brief for Defendants-Appellees, p. 16. The decision of the court of appeals, as discussed in more detail *infra*, relied almost exclusively on whether a catalyst theory was available as a basis for a fee award. There is no merit in the respondent's contention that the catalyst issue was either not raised or was not fully litigated in the courts below.

In any event, it is a well recognized rule of this Court that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Here, the petitioners properly presented a claim for attorneys fees in the lower courts. They are therefore entitled to formulate "any argument they like[ ] in support of that claim," whether or not the argument was presented to the lower court. *Id.* at 535. *Accord, Dewey v. City of Des Moines*, 173 U.S. 193, 197 (1899) ("[p]arties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed"); *Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961, 965 (1995) (a party may make "a new argument to support what has been his consistent claim").

Even if petitioners' catalyst argument were misconstrued as a new claim or issue not raised below, it would still be properly before this Court since it was addressed and decided by the lower court. This Court's practice "permit[s] review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 40 (1992). *Accord, Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991) ("[i]t suffices for our

purposes that the court below passed on the issue presented"). The court of appeals undeniably decided the catalyst issue in this case. App. 6-8. Accordingly, that issue is properly before this Court.

II. The Decision Sought to Be Reviewed Is that of the Court of Appeals

Respondents argue at great length that the petition should be denied because of various findings and rulings by the district court. Brief in Opposition of Respondent Wilkins, pp. 9-13; Brief in Opposition for the South Carolina Senate, pp. 17-23. The argument is misplaced. The decision for which review is sought in this Court is not the decision of the district court but the decision of the court of appeals.[2]

The decision of the court of appeals, with the exception of its disposition of the Section 5 enforcement issue, was based entirely upon *S-1 and S-2*.[3] The court of appeals held that plaintiffs "fail to meet the standard set forth in *S-1 and S-2*," in that they did not secure "an enforceable judgment against the defendants." App. 8. Such was the entire extent of the court's agreement with the district court's ruling on the issue of catalyst. *Id.*

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[2] 28 U.S.C. § 1254(1), pursuant to which this petition was filed, confers jurisdiction upon this Court to review "[c]ases in the court of appeals . . . [b]y writ of certiorari."

[3] As to the Section 5 issue, the court of appeals held that the holding or judgment of the district court that the special senate election was subject to preclearance did not materially alter the relationship between the parties "such as to merit treatment as a 'prevailing party.' " App. 8.

No member of the court of appeals found that the securing of judicial and legislative redistricting was insignificant or merely technical success. To the contrary, Judge Motz in her concurring opinion expressly acknowledged that plaintiffs were "the 'catalyst' " for both judicial and legislative action. App. 10. The Senate respondent concedes, as it must, that in Judge Motz's view "Petitioners would have prevailed under the 'catalyst' theory." Brief in Opposition for the South Carolina Senate, p. 11 n.4. But for the litigation, "the court would not have intervened in the reapportionment process," and "the South Carolina General Assembly would not have adopted a scheme that drew heavily from that judicially crafted plan." App. 10. According to Judge Motz, "the 'catalyst' analysis was devised to address cases like the one at hand." *Id.* Plaintiffs presented "the classic 'but for' scenario." *Id.*[4]

Respondents repeatedly and improperly conflate the decision of the three-judge district court with that of the court of appeals. They argue that the outcome of the case in the court of appeals would remain the same whether or not it applied catalyst theory because the *district court* rejected the fee claim on catalyst grounds. Under our system of appellate review, however, the inconsistent rulings of a lower court do not trump those of an appellate court. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (noting "the

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[4] In his concurring opinion Judge Niemeyer stated that he would affirm on the additional ground of no abuse of discretion by the district court, but he did *not* find that plaintiffs were unsuccessful "in the political process," only that in his view the issue was "unclear." App. 9.

hierarchy of the federal court system created by the Constitution and Congress"); *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975) (a decision of a panel of the court of appeals "is binding . . . upon the district court"). The contrary views of the district court in this case concerning the affect of applying causation analysis are unavailing and immaterial.

In light of Judge Motz's opinion, and the *per curiam* opinion's exclusive reliance upon *S-1 and S-2*, the court of appeals would surely have found petitioners to be prevailing parties under a theory of causation. The record admits of no other interpretation but that petitioners were prevailing parties and were denied fees solely because the Fourth Circuit law is that being a catalyst is not a basis for fees.

Despite the views of the district court, petitioners' success in this case was exceptional. They succeeded on the issues of the viability of the challenged plans, their appropriateness for continued use, impasse, and the Section 5 submission of the special election in Senate District One. Plaintiffs prevailed in their appeal to the Supreme Court and achieved other significant results, *e.g.*, court ordered and legislatively adopted redistricting plans and elections held in a timely manner. A judgment was entered ordering into effect redistricting plans under which elections were in fact held and legislators elected for the state house, senate and Congress. No amount of denial or obfuscation by respondents can disguise the fact that plaintiffs were enormously successful, nor discount "the public purpose served" by the litigation. *Farrar v. Hobby*, 113 S.Ct. 566, 579 (1992) (O'Connor, J., concurring).

III. The Adoption of Petitioners' Plans Is not a Condition for a Fee Award

The fact that the district court and the legislature did not adopt the specific plans advocated by petitioners is immaterial. As the complaints make clear, petitioners' primary goals were declarations that the existing plans were unlawful and court ordered interim plans that would allow the 1992 elections to go forward in a timely manner. App. 4 (plaintiffs "sought a declaration that the legislative process was at an impasse, thereby allowing for judicial intervention").[5]

A court rarely adopts a private party's specific plan. No plaintiffs would rationally pin all their hopes of being prevailing parties upon the fortuitous occurrence that a court would adopt exactly their redistricting proposals. For that reason lower federal courts have recognized that adoption of a party's proposed plan is not a condition for prevailing party status. *See Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435, 441 (D.C.Cir. 1982) ("[f]ee claimants under the Act need not show- . . . that their proposed plan was adopted in order to be found 'prevailing parties.' "); *Ramos v. Koebig*, 638 F.2d 838, 845 (5th Cir. 1981) ("that the district court rejected plaintiffs' plan . . . is irrelevant"); *Armour v. State of Ohio*, 774 F.Supp. 1044, 1063 (N.D.Ohio 1991) (plaintiffs were

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[5] The Senate respondent is mistaken that all plaintiffs "really wanted" was an order implementing their plans. Brief in Opposition for the South Carolina Senate, p. 13. What plaintiffs "really wanted" was timely elections pursuant to plans that preserved minority voting strength, and that is what they got.

prevailing parties despite the fact that the court refused to implement plaintiffs' proposed redistricting plan).

The cases relied upon by respondents are not only not to the contrary, but support the position of petitioners. *Daggett v. Kimmelman*, 811 F.2d 793, 801 and n.10 (3d Cir. 1987), citing *Commissioners Court of Medina County, Texas v. United States* and *Ramos v. Koebig* with approval, held that a " 'prevailing party' is entitled to an attorney's fee award for work performed in the remedy phase of redistricting litigation." Similarly, in *Hastert v. Illinois State Board of Election Commissioners*, 28 F.3d 1430, 1440 (7th Cir. 1993), also relied upon by respondents, the court concluded that one set of plaintiffs (the Nieves group) "should be considered a 'prevailing party' in this litigation, primarily because its fundamental objective, the creation of an Hispanic district, was achieved by the litigation." Another set of plaintiffs, the Urban League plaintiffs, were also deemed prevailing parties even though their plan was not adopted by the district court. According to the court of appeals, the "League plaintiffs . . . 'prevailed' as to the creation of the Hispanic district, the preservation of three African-American districts and retention of the Second Ward in the First District." *Id.* at 1442. The fact that the League's separate plan was not adopted, or that the League did not endorse the plan adopted by the court, was "surely an extraordinarily fine distinction, almost irrelevant to the substance of the redistricting process." *Id.* The court concluded that "the Urban League must also be considered a prevailing party." *Id.* Here, where plaintiffs achieved their objectives in securing remedial redistricting that allowed elections to be held in a timely and constitutional manner, and that

created or preserved majority black districts, the fact that their specific plans were not adopted is irrelevant to their status as prevailing parties.

IV. The Other Circuits Have no Difficulty in Applying Catalyst Theory

Respondents argue that *S-1 and S-2* represents the better rule because catalyst theory is unmanageable. The argument is makeweight. Judicial decisionmaking is by its nature demanding, but *all* of the other circuits apply causation theory in determining prevailing party status, and *none* has concluded that the standard is unworkable.[6]

Respondents themselves appear to have doubts about the rule in *S-1 and S-2*. They note "the number of cases from other circuits which subsequently have questioned *S-1*," and speculate that "it is possible that the Fourth Circuit might choose to modify S-1." Brief in Opposition of Respondent Wilkins, p. 19. That possibility, however, is not a basis for denying this petition. Here, the

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[6] Respondents also take petitioners to task for failing to note that the Court denied certiorari in *S-1 and S-2*, implying that the denial of certiorari somehow means approval of the decision of the lower court. To the contrary, as this Court has repeatedly stressed, "[t]he denial of a writ of certiorari imports no expression upon the merits of the case." United States v. Carver, 260 U.S. 482, 490 (1923). A denial of certiorari means nothing more than that the "Court has refused to take the case." Darr v. Burford, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting).

conflict among the circuits involving an important question of statutory construction is irreconcilable. The petition should be granted. *Shapiro v. United States*, 335 U.S. 1, 4 (1948).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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